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SUPREME COURT OF THE UNITED STATES

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OCTOBER TERM, 1942

No. 25

BENJAMIN McNABB, FREEMAN McNABB, AND
RAYMOND McNABB,

Petitioners,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE SIXTH CIRCUIT.

MEMORANDUM FOR PETITIONER.

W. H. NORVEILL,
Counsel for Petitioners.

E. B. BAKER,
J. M. C. TOWNSEND,
WILKES T. THRASHER,

Of Counsel.

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MEMORANDUM FOR PETITIONER.

Opinion Below.

The opinion of the Circuit Court of Appeals (R. 40) is reported at 123 F. (2d) 848.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered December 6, 1941. Rehearing was denied on January 8, 1942. The petition for a writ of certiorari was filed

February 13, 1942. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. Certiorari granted 62 Supreme Court 1305.

Questions Presented.

Whether the trial court should have excluded from evidence petitioners' extra judicial admissions on the ground that they were not voluntarily made.

Statement.

Petitioners were convicted in the United States District Court for the Eastern District of Tennessee of Second degree murder for the killing of Samuel Leeper while he was engaged in the performance of his official duties as Investigator for the Alcohol Tax Unit of the Bureau of Internal Revenue. (18 F. S. C. A., 253, 452.)

The petitioners were sent to prison for 45 years. The Sixth Circuit Court of Appeals affirmed the judgment (R. 40).

The convictions were brought about by the use of confessions and admissions by the petitioners.

Evidence as to How the Confessions and Admissions Were Obtained.

On the night of July 31st, 1940, agents of the Alcohol Tax Unit went to what is known as the McNabb settlement in Marion County, Tennessee, for the purpose of apprehending members of the McNabb family who were supposedly in possession of untax paid whiskey. On arrival they discovered several cans of whiskey. They started to destroy this whiskey, and while emptying the cans someone fired on them from a shot gun. The agent, Samuel Leeper, died shortly thereafter.

Some three or four hours later Alcohol Tax Agents went to the home of petitioners Freeman McNabb and Raymond McNabb and arrested them. They did not have a complaint or warrant of any kind. (The complaint was not taken out until the afternoon of August 2nd, R. 34.)

Emuel McNabb was also arrested at that time, but was acquitted.

Immediately after their arrest the petitioners, Raymond and Freeman, were brought to Chattanooga and taken to the Federal Building, arriving at approximately two o'clock A. M. They were confined in the "bull pen", adjoining the Marshal's office. This is a small barred room. It does not have beds, benches or chairs. Petitioners were kept in this room from about 2 A. M. until approximately 5 P. M. the next afternoon, or approximately fifteen hours. During that time they had to sit or lie on the bare floor (R. 32-29-12-13). They were then taken to the Hamilton County jail and there confined. After remaining in the Hamilton County jail for a period of about two hours, the agent in charge (Taylor) sent to the jail and had the prisoners brought back to the Federal building where he and other agents questioned them until about 1 A. M. when the prisoners were returned to the Hamilton County jail. The reason he sent for the prisoners at night was:

"I questioned Barney that morning at the cemetery and again that night about 9 o'clock in the Post Office Building. I sent to the jail for them and didn't know whether they were asleep or not, but it is not unusual to get defendants out of bed when you are trying to solve a crime as quickly as you can and if we can get them at night we do so. We are interested in getting the truth about it while it can be gotten. I probably could have gotten the truth later but it seems to me a man knows more about what he did immediately afterward and will be more apt to tell the truth

about it than at any other time. None of the defendants had an opportunity to talk with their families or to a lawyer. The reason we questioned the defendants at night was because we wanted to know as much about the case as possible before questioning them and it was some time before we got to them" (R. 36-7).

The uncontradicted facts in this case show:

1. The officers knew the truth, and constantly reminded the petitioners they knew the truth, and that they, the petitioners, were lying (R. 36-9-10-15-17).

2. Raymond and Freeman McNabb were questioned until 1 o'clock on the night of August 1st (R. 36).

3. Raymond and Freeman McNabb were questioned off and on by various officers all day on August 2nd (R. 36).

4. Benjamin McNabb was questioned on August 2nd, and at one time during the questioning was compelled to remove all of his clothes and turn around naked in the presence of several officers (R. 36).

5. All three of the petitioners, together with Barney and Emanuel McNabb who were acquitted, were taken out of bed by Federal officers between 9 and 10 o'clock on the night of August 2nd, and questioned until at least 2 A. M. on the morning of August 3rd, when "satisfactory statements" were obtained by the officers, bearing in mind that the officers knew what was true and what was not true beforehand (R. 23-36-20-17).

6. The officers were very tired during this questioning and wanted to go to sleep (R. 20).

7. At least six officers participated in the questioning and the officers came in and out of the room at all times. (At least ten officers testified in this case) (R. 17).

8. The petitioners at no time had relatives, friends, counsellors, or advisers present, and when they tried to get in relatives, friends, counsellors, and advisers were denied admittance (Government Brief, page 24).

9. The petitioners were ignorant mountain boys, none of them having been further than the 4th grade in school, and none of them having been more than 25 miles away from home before they were arrested (Government Brief, page 23).

10. The officers were investigating the death of a fellow officer and from the mere fact that at least ten officers were aiding in the investigation of this matter would indicate their agitation and concern over the matter.

The government admits, in brief, pages 22 to 26, that points 4-8-9-10-11 are true.

11. Freeman and Raymond were confined in a bare room for fifteen hours (Government Brief, page 23).

Argument.

This case is comparable with *Anderson et al. v. United States*, Number 10, present term.

Practically all of the elements of compulsion present in *Ward v. United States*, 62 Supreme Court 143, are present. See also:

Bram v. United States, 168 U. S. 532;

Wan v. United States, 266 U. S. 1;

Chambers v. Florida, 309 U. S. 629.

Summary.

For manifest violations of the 5th Amendment, Counsel feel this case should be reversed and petitioner awarded a new trial.

Respectfully submitted,

W. H. NORVELL,
Attorney for Petitioners.

E. B. BAKER,
J. M. C. TOWNSEND,
WILKES T. THRASHER,
Of Counsel.

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